

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda J. Bassi, Chief
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John W. Hickenlooper
Governor

Mike King
DNR Executive Director

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CWCB Director

DATE: May 3, 2013

SUBJECT: **Agenda Item 18, May 14-15, 2013 Board Meeting**
Stream and Lake Protection Section – Proposed Acquisition
of a Contractual Interest in Water on the Florida River

Introduction

Edgemont Ranch Metropolitan District (“Edgemont”) and CWCB are working toward a water delivery agreement for instream flow use on the Florida River. The water will be used on an instream flow (“ISF”) reach extending from the outlet of Lemon Reservoir to the confluence with Salt Creek, a distance of approximately twenty-seven miles. The water right to be used is part of an augmentation plan pending in Edgemont’s water court Case No. 7-11CW041. CWCB filed a Statement of Opposition in the case to protect its ISF water rights on the Florida River. During negotiations in this case, Edgemont offered to release augmentation water to CWCB for ISF use. CWCB would use the released water to help bring stream flows up to the decreed ISF rates and thereby protect the releases from diversions by others through the ISF reach.

A general map of the area is attached as Exhibit 1; a draft of the Water Delivery Agreement is attached as Exhibit 2.

Staff Recommendation

Staff recommends that the Board:

1. Accept the interest in water that would be provided by Edgemont under the Water Delivery Agreement;
2. Determine that the amounts set forth in the Water Delivery Agreement are appropriate to preserve the natural environment to a reasonable degree on the subject reach of the Florida River in the time, amounts and locations provided by the Agreement;
3. Determine that the best use of the interest in water to be acquired is in the time, amounts and locations provided by the Water Delivery Agreement and confirmed in the water court decree in Case No. 7-11CW041; and
4. Authorize the CWCB Director to finalize and sign the Water Delivery Agreement.

Background

Edgemont currently provides and augments water under previous decrees and augmentation plans. However, one of the previously decreed augmentation sources, the Spring Valley Lake (“SVL”), has not been built. Edgemont filed the subject Case No. 11CW041 to obtain a decree for a different augmentation source. The new augmentation source will be used to make replacements of out-of-priority non-irrigation season diversions that would have been replaced by the SVL under the old augmentation plans. In the current case, Edgemont will secure 11.5 acre-feet of augmentation water in Lemon Reservoir to cover the current maximum allowed build out of the project of 944 units. The current level of development is approximately 1/3 of the maximum build-out level of the project. Edgemont plans to release to CWCB for ISF use the amount of water each year that it does not need for replacing out-of-priority depletions under its augmentation plan, plus one extra acre-foot. As development continues and Edgemont needs more water to replace out-of-priority depletions, the CWCB release would be reduced accordingly.

CWCB's Role and the Water Right

CWCB filed a statement of opposition in Edgemont’s Case No. 11CW041 to protect its ISF water right on the Florida River decreed in Case No. W-1763-77. During case negotiations to develop protective terms and conditions for the water court decree, it became apparent that in this case, Edgemont intends to simply add an augmentation source to its existing plan for augmentation to replace out-of-priority depletions from previously decreed structures during the non-irrigation season. Anticipated depletions from this new plan will be the same as already decreed under the previous augmentation plans. However, it also became clear that Edgemont and CWCB have a shared interest to preserve the natural environment by maintaining stream flows through the reach. Edgemont proposed releasing its Lemon Reservoir water leased from the Florida Water Conservancy District (“FWCD”) to the CWCB to the extent the water is not needed to replace out-of-priority depletions under its augmentation plan. Edgemont plans to lease 11.5 acre-feet of augmentation water and expects to need only approximately 3.8 acre-feet for augmentation releases under the current level of development. The remaining 7.7 acre-feet of augmentation water would be available for CWCB’s use as an augmentation supply for its ISF water right. As development continues and Edgemont needs more water to replace out-of-priority depletions, the CWCB release would be reduced accordingly.

Authorization of CWCB’s use of the water and details governing the administration of the released water will be codified in the water court decree in Case No. 7-11CW041. Releases will be constant over the non-irrigation season in accordance with Edgemont’s depletion schedule set forth in the decree, with a modification clause for CWCB, Edgemont and FWCD to adjust the release dates and rates as needed, with proper notice to other parties and to the Division of Water Resources.

Under the delivery agreement, Edgemont will bring about reservoir releases by FWCD of water stored in Lemon Reservoir and leased by the Edgemont for exclusive use by the CWCB to preserve the natural environment to a reasonable degree under its decreed Florida River ISF water right and pursuant to the water court decree in Case No. 7-11CW041. The CWCB will protect the delivered water through the ISF reach and request administration to prevent diversion of the water by other water users.

The Board's Water Acquisition Procedures

Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") sets forth the Board's procedures for acquiring water for ISF use. ISF Rule 6 requires a minimum of two Board meetings to allow for public input prior to taking final action on a proposed acquisition. The Board's initial consideration of this proposal at the March, 2013 Board meeting initiates the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. ISF Rule 6m.(4) provides that any person may request the Board to hold a hearing on the proposed acquisition, and that such a request must be filed within twenty days of the Board's initial consideration. No such request was filed and the time for filing such request has expired. Staff will request the Board to take final action on the proposal at this May, 2013 Board meeting.

ISF Rules 6e. and 6f. require the Board to evaluate the appropriateness of the acquisition and determine how best to utilize the acquired water rights to preserve or improve the natural environment. The Rules list several factors the Board may consider in its evaluation of the acquisitions. Several of the factors address water rights that need to be changed from irrigation or other uses to instream flow uses. Because this Acquisition involves the use of water already decreed for augmentation to help bring the flows up to the decreed ISF rate, several of the factors do not apply. This memo addresses the applicable factors.

Pursuant to statute, Staff has requested recommendations from Colorado Parks and Wildlife, the U.S. Department of Agriculture and the U.S. Department of Interior. Pursuant to ISF Rule 6m.(1), Staff has provided notice of the proposed acquisition to all persons included on the appropriate ISF Subscription Mailing Lists and provided notice to the State Engineer's Substitute Supply Plan Notification List. Staff has requested a biological analysis from Colorado Parks and Wildlife ("CPW") pursuant to Rule 6f.(2). Staff anticipates that CPW will address the Board regarding this acquisition at the Board meeting.

Summary of Proposed Acquisition

Under the Water Delivery Agreement, Edgemont will bring about reservoir releases by FWCD of water stored in Lemon Reservoir and leased by Edgemont to help preserve the natural environment to a reasonable degree on the Florida River in CWCB's instream flow reach decreed in Case No. W-1763-77. Edgemont will lease 11.5 acre-feet and will initially provide up to approximately 7.7 acre-feet (or more if there is no call during the non-irrigation season) to CWCB for ISF use each year at a rate of approximately 0.02-0.03 cfs throughout the non-irrigation season. The amount available for ISF use will decrease gradually over time as Edgemont's augmentation requirements increase, and will decrease if there is a call during the non-irrigation season by a water user other than CWCB. Previously CWCB, Edgemont and CPW were considering a 2-week aggregation of releases, however, because of contracts and operation complications identified by FWCD and US Bureau of Reclamation, the default release schedule is to be a constant flow rate throughout the non-irrigation season. Pursuant to Edgemont's pending decree in Case No. 7-11CW041, the release schedule may be modified upon agreement among CWCB, Edgemont and FWCD.

Existing Instream Flow Water Rights

CWCB will use the released water to help maintain stream flows in the Florida River through CWCB's decreed ISF reach to preserve the natural environment in amounts up to the decreed rates in Case No. W-1763-77, as shown below:

| CWCB Case No. | Stream/Lake | Amount (dates) | Approp. Date | Watershed | County |
|---------------|--|---|--------------|-----------|----------|
| W-1763-77 | Florida River - outlet of Lemon Res to confl Salt Creek (27 miles) | 7 cfs (07/01-10/14) 14 cfs (10/15-06/30) | 1/19/1977 | Animas | La Plata |

Existing Natural Environment

The Florida River supports cold water fisheries. Flows in this reach are mainly controlled by reservoir operations and other large diversions.

Proposed Use and Potential Benefits of the Delivered Water

The Board could use the delivered water to preserve the natural environment to a reasonable degree in the Florida River between Lemon Reservoir and Salt Creek, a distance of approximately twenty-seven miles. The reservoir releases would be used to help maintain the Board's ISF water right up to the decreed rates. The CWCB would protect the releases from diversion by other water users from the Lemon Reservoir dam to the lower terminus of the ISF reach at the confluence with Salt Creek. Downstream of the confluence with Salt Creek the water would revert back to waters of the State of Colorado and would be available for diversion for any legal beneficial use.

Other Water Rights in Proposed Reach and Potential Injury to Existing Rights

Because the ISF use under this proposal will be achieved with existing fully consumable water released from storage, other water rights in the subject reaches will not be injured by the proposed ISF uses. Also, the water court decree implementing the Delivery Agreement will contain terms and conditions to assure that no vested water rights on any of the reaches will be injured as a result of the ISF use.

Administrability

Staff has confirmed with the Division Engineer and Water Commissioner that the CWCB's proposed uses of the delivered water is administrable.

Effect of Proposed Acquisition on Maximum Utilization of the Waters of the State; and Availability of the Delivered Water for Subsequent Use Downstream

Edgemont's leased water in Lemon Reservoir is already decreed for augmentation use. The released water will be beneficially used for ISF purposes in accordance with the Delivery Agreement down to the confluence with Salt Creek. Downstream of the lower terminus, the water reverts back to waters of the State of Colorado and is available for diversion for any legal beneficial use.

Effect of Proposed Acquisition on Any Relevant Interstate Compact Issue

It is anticipated that this water will be diverted and used directly or by exchange by other water users downstream once it has satisfied its intended beneficial use in the Florida River. Consequently, it does not appear that this acquisition will raise any compact issues.

Costs to complete the transaction, or other associated costs

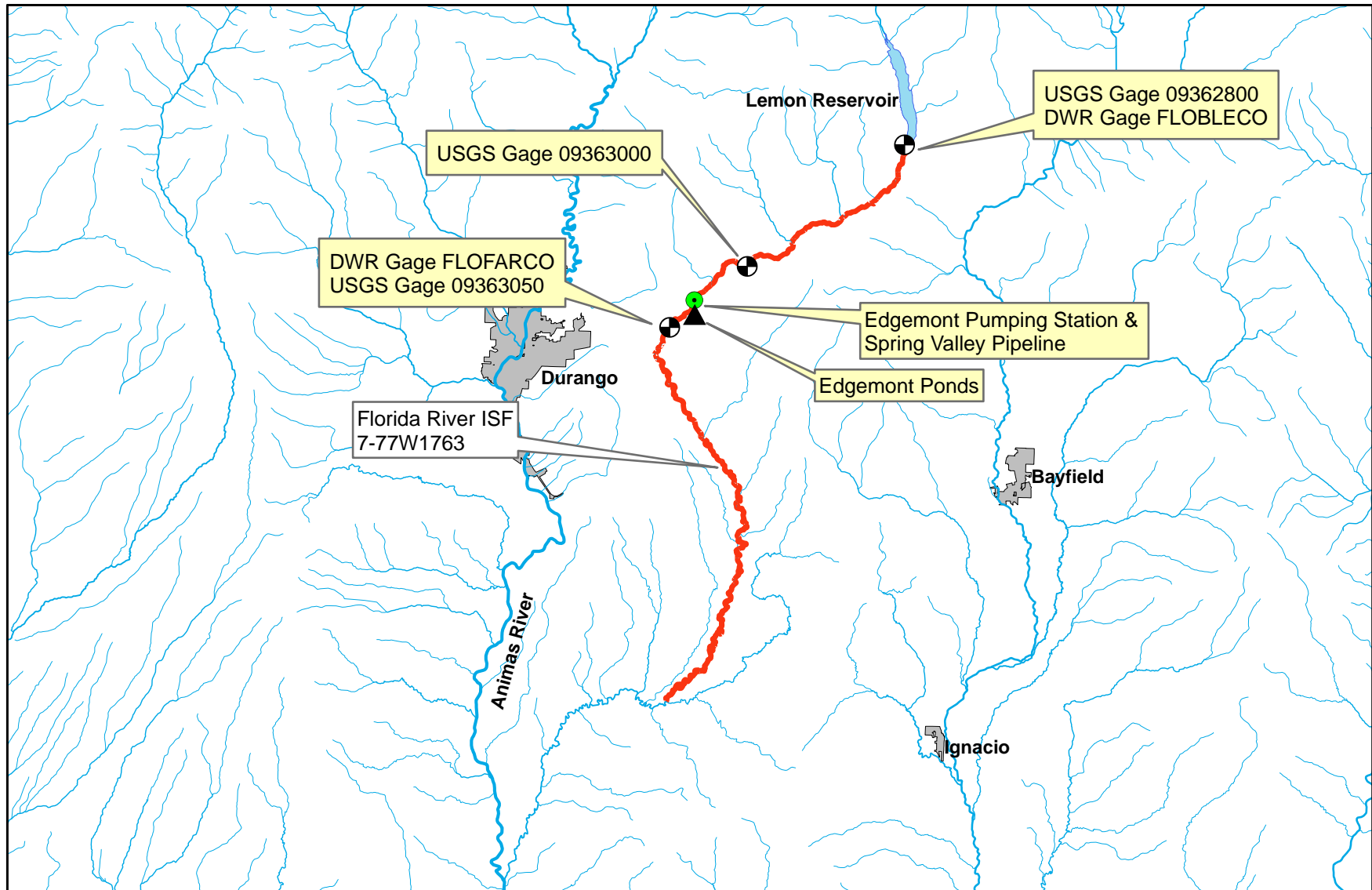
Edgemont is not requesting the Board to pay for the delivered water or to participate as a co-applicant in the water court proceeding. Edgemont has offered to perform all record keeping, accounting and reporting. Because CWCB is already a party in the water court case, little extra expense is expected as a result of this acquisition.

Attachments

Exhibit 1: General Map

Exhibit 2: Draft Water Delivery Agreement

Exhibit 1



May 14-15, 2013 Board Meeting
Agenda Item 18: Proposed Acquisition of Contractual Interest in Water
Case No. 7-11CW041: Edgemont Ranch Metropolitan District

0 3.5 7 14 Miles



Exhibit 2

DRAFT 5-2-2013

DELIVERY AGREEMENT

The Colorado Water Conservation Board (“CWCB”), an agency of the State of Colorado, and Edgemont Ranch Metropolitan District (“Edgemont”), a quasi-municipal corporation of the State of Colorado, in consideration of the mutual promises contained herein, agree as follows:

RECITALS

- A. Edgemont Ranch Metropolitan District is a quasi- municipal corporation created and existing under Colorado law. Edgemont Ranch Metropolitan District is responsible for operating and maintaining water and wastewater treatment systems to provide water and wastewater services to the residents of Edgemont Ranch and Edgemont Highlands.
- B. Colorado Water Conservation Board is an agency of the State of Colorado created to aid in the protection and development of the waters of the state for the benefit of the present and future inhabitants of the state. In 1973, the General Assembly vested the CWCB with the exclusive authority to adjudicate waters of natural streams for instream flows between specific points on a stream to preserve the natural environment to a reasonable degree.
- C. In Case No. 2011CW041, Water Division No. 7, Edgemont Ranch Metropolitan District filed for approval of a plan for augmentation.
- D. The CWCB opposed Edgemont Ranch Metropolitan District’s water court application in Case No. 2011CW041.
- E. Under the augmentation plan in Case No. 2011CW041, Edgemont Ranch Metropolitan District will lease 11.5 acre feet of water stored in Lemon Reservoir from the Florida Water Conservancy District for augmentation use and for use by CWCB for instream flows.
- F. Water not needed to augment out-of-priority depletions will be released for exclusive use by the CWCB to preserve the natural environment to a reasonable decree (“CWCB Releases”).
- G. The CWCB holds an instream flow water right on the Florida River between the outlet of Lemon Reservoir and the confluence of the Florida River with Salt Creek decreed in Case No. W-1763-77.

- H. The CWCB and Edgemont Ranch Metropolitan District wish to cooperate in coordinating releases of the CWCB Releases from Lemon Reservoir operated by the Florida Water Conservancy District.
- I. Pursuant to section 37-92-102(3), C.R.S. (2012), the CWCB may acquire by contractual agreement with any governmental entity such water, water rights or interests in water that are not on the Division Engineer's abandonment list in such amount as the CWCB determines is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree. Pursuant to Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2, on [DATE], the CWCB found that Edgemont Ranch Metropolitan District's deliveries of water under this Agreement of up to 11.5 acre feet between September 28 of each year through May 14 of the next year pursuant to the decree in Case No. 2011CW041 ("the Decree"), are appropriate to preserve the natural environment on the Florida River through CWCB's decreed instream flow reach to a reasonable degree.

NOW THEREFORE, the CWCB and Edgemont Ranch Metropolitan District agree as follows:

DELIVERY

1. Subject to the terms of this agreement, Edgemont's lease agreement ("Lease") with the Florida Water Conservancy District ("FWCD"), and the Decree, Edgemont will bring about reservoir releases by the FWCD of water stored in Lemon Reservoir pursuant to the Lease for exclusive use by the CWCB to preserve the natural environment pursuant to the Decree.
2. Beginning September 28 of each year through May 14 of the next year, Edgemont Ranch Metropolitan District shall cause to be released the portions of its 11.5 acre feet of leased water not used or needed for augmentation, and shall release said water to the Florida River for instream flow use on a constant release schedule throughout the non-irrigation season in accordance with Edgemont's depletion schedule, as described in the Decree and subject to the terms of the Decree and the Lease.
3. The time periods for CWCB Releases between September 28 and May 14 of the next year may be modified upon mutual agreement by CWCB, Edgemont, and the FWCD, and upon providing written notice the Division Engineer by September 1 of each year, as described in the Decree.
4. CWCB shall protect the delivered CWCB Releases through the instream flow reach and will request administration to prevent diversion of the water by other water users.

**CONDITIONS OF THE CWCB'S USE OF EDGEMONT RANCH METROPOLITAN
DISTRICT'S WATER RIGHTS**

5. CWCB shall use the CWCB Releases to help maintain stream flows in the Florida River through CWCB's decreed instream flow reach to preserve the natural environment in amounts up to the decreed rates in Case No. W-1763-77, as shown below:

| CWCB Case No. | Stream/Lake | Amount (cfs) (dates) | Approp. Date | Watershed | County |
|--------------------------|--|---|---------------------|------------------|---------------|
| W-1763-77 | Florida River - outlet of Lemon Res to confl Salt Ck (27 miles) | 7 cfs (07/01- 10/14) 14 cfs (10/15- 06/30) | 1/19/1977 | Animas | La Plata |

**USE OF THE SUBJECT WATER RIGHT BELOW THE SPECIFIED
REACH**

6. Below the downstream terminus of CWCB's Florida River instream flow water right decreed in Case No. W-1763-77, the CWCB Releases revert back to waters of the State of Colorado and are available for diversion for any legal beneficial use.

WATER COURT PROCEEDINGS

7. In Case No. 2011CW041, CWCB has stipulated to a proposed decree containing terms and conditions that CWCB Releases will be used for instream flow purposes exclusively by the CWCB in accordance with the Decree and this agreement.

CALL FOR ADMINISTRATION

8. Edgemont Ranch Metropolitan District shall be responsible for maintaining all records necessary for the implementation of this Agreement, using forms mutually agreeable to the parties, and all records required by the Division Engineer for administration of the CWCB Releases.

9. Edgemont Ranch Metropolitan District will provide annual accounting related to the operation of this Agreement to the CWCB and the Division Engineer. Upon request, Edgemont Ranch Metropolitan District will also provide any additional accounting to CWCB that Edgemont is required to provide to Division of Water Resources under the Decree.

MISCELLANEOUS PROVISIONS

10. This Agreement shall not be otherwise assignable by either party without written consent of the other.

11. Pursuant to section 37-92-102(3), C.R.S. (2011), the terms of this Agreement shall be enforceable by each party as a water matter in the District Court for Water Division No. 7; provided, however, that before commencing any action for enforcement of this Agreement, the party alleging violation shall notify the other party in writing of the alleged violation and the parties shall make a good faith effort to resolve their differences through informal consultation.

12. Specific performance of this Agreement shall be the exclusive remedy for failure of either party to comply with any provision of this Agreement.

13. This Agreement shall be construed in accordance with the laws of the State of Colorado and shall be interpreted broadly to affect its purposes.

14. This Agreement shall remain in effect as long as Edgemont leases water from the FWCD for release from Lemon Reservoir pursuant to the Decree.

IN WITNESS WHEREOF, the CWCB and Edgemont Ranch Metropolitan District have executed this Agreement as of _____ day of _____, 2013.

ATTEST:

EDGEMONT RANCH METROPOLITAN
DISTRICT

SECRETARY

BY: _____
PRESIDENT

DATE: _____

COLORADO WATER CONSERVATION
BOARD

BY: _____
Director

DATE: _____